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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. [redacted] 37

DAVID A. WRIGHT,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

ASHBY WILLIAMS,
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No. 939

DAVID A. WRIGHT,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Your petitioner, David A. Wright, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case.

Question Presented.

Whether a Bill originating in the Senate of the United States, passed by both Houses of the Congress and duly presented to the President became a law of the United States without the signature and approval of the President when the same was, on the tenth day (Sundays excepted) after presentation to him, delivered by the President to the Secretary of the Senate without his signature and with his objections thereto, the House of Representatives being in session and the Senate being in recess on said tenth day.

Reasons for Granting the Writ.

1. The decision of the Court of Claims is on a question of substance relating to the construction and application of Clause 2, Section 7, Article I of the Constitution of the United States which has not been, but should be, settled by this Court. This Court has never decided the question of whether a Bill becomes a law without the President's signature when he is not prevented from returning it within the constitutional time limit by reason of the adjournment of the Congress, but may be prevented from returning it to the House in which it originated on the tenth day after presentation by reason of a recess of such House.

2. The decision of the Court of Claims is on a question of general importance in that it is vital to the public to know whether, in the circumstances here presented, a Bill, not approved by the President, is law. Heretofore it has been the settled and unbroken Legislative and Executive construction that a Bill not approved and not returned by the President in the time and manner prescribed by the Constitution fails to become a law only where its return has been prevented by the adjournment of both Houses of Congress, and never where its return was prevented by the adjournment or recess of the House alone in which the Bill originated.

3. The decision is in conflict with the plain, unambiguous provisions of Clause 2, Section 7, Article I of the Constitution in that it is only in case the President is prevented by an adjournment of "the Congress" from returning the Bill that it does not become a law and not in case the President may be prevented by an adjournment or recess of *one House of Congress.*

4. The decision is in conflict with the decision of this Court in *The Pocket Veto Case,* 279 U. S. 655. In that case, this Court held that the Bill must be returned to the House in which it originated *in session* and that a delivery to the Secretary of the Senate, as in this case, or to the Clerk of the House of Representatives does not fulfill the constitutional requirement.

WHEREFORE, it is respectfully submitted that the petition should be granted.

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BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The Court of Claims rendered no opinion (R. 6).

Jurisdiction.

The Court of Claims entered judgment dismissing the petition on February 8, 1937 (R. 6). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

Statutes Involved.

Section 1, Article I of the Constitution (U. S. C. A., Constitution, Part 1, p. 29):

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Clause 2, Section 7, Article I of the Constitution (U. S. C. A., Constitution, Part 1, p. 32):

> "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting

for and against the Bill shall be entered on the Journal of each House respectively. *If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law".*

Statement.

A Bill of Congress (S. 713—74th Congress, 1st session), which originated in the Senate (R. 3) and which had duly passed both Houses of Congress (R. 1) conferred jurisdiction on the Court of Claims to reinstate, reopen, rehear, and readjudicate the claim of petitioner against the United States (R. 3).

The said Bill was presented by Congress to the President on April 24, 1936 (R. 1).

Tuesday, May 5, 1936, was the tenth day (Sundays excepted) after the presentation of the Bill to the President. On Monday, May 4, 1936, at 3:25 P. M., the Senate, under its constitutional right so to do (Cl. 4, Sec. 5, Art. I), took a recess until noon Thursday, May 7, 1936 (R. 1), the House of Representatives being in session during said recess of the Senate (R. 1).

During such recess of the Senate the President, by a messenger, delivered said Bill and his objections thereto in writing to the Secretary of the Senate, and on May 7, 1936, when the Senate reconvened after the aforesaid recess, the Secretary of the Senate addressed a letter to the Vice-President advising him of the delivery of said Bill and objections to him, and he, the said Secretary, enclosed therewith the unsigned Bill and the President's said objections (R. 2).

On the same day, May 7, 1936, the Vice-President laid before the Senate the Secretary's letter and the President's objections, and the same were read, and the said Bill S. 713

with the President's objections were referred to the Senate Committee on Claims (R. 3).

Under authority of said Act of Congress (S. 713), petitioner, on September 14, 1936, filed in the Court of Claims his petition to reinstate, reopen, rehear and readjudicate his said claim (R. 1), on October 15, 1936, respondent filed in said Court its opposition to said petition (R. 4), and on February 8, 1937, the Court of Claims entered its judgment dismissing the petition, without opinion (R. 6).

Specification of Errors.

The Court of Claims erred:

1. In failing to hold that delivery to the Secretary of the Senate of the unsigned Bill and the President's objections thereto was not a return of said Bill and objections to the Senate, the House in which the Bill originated.

2. In failing to hold that the President not having returned the Bill with his objections thereto to the Senate in session within ten days (Sundays excepted) and the President not having been prevented from returning the Bill by an adjournment of "the Congress", said Bill became law without the President's approval and signature.

3. In failing to hold that it is the adjournment of "the Congress" and not of one of the Houses thereof which must prevent the return of a Bill by the President in order that said Bill, not signed and approved by him, shall not become a law.

4. In failing to hold that said Bill, S. 713, is a law of the United States.

5. In dismissing the petition.

ARGUMENT.

I.

Delivery of the Bill and objections thereto to the Secretary of the Senate is not a return thereof to the Senate as required by the Constitution.

The constitutional requirement is that the President must return the Bill and his objections thereto to the House in which the Bill "shall have originated". The Bill originated in the Senate and was, therefore, returnable to the Senate.

But the Bill was not returned to the Senate but was delivered, with the objections, to the Secretary of the Senate. This Court has explicitly held that the return required by Clause 2, Section 7, Article I, of the Constitution must be to the House in which the Bill originated "in session" (*The Pocket Veto Case*, 279 U. S. 655). Accordingly, it was the constitutional requirement that this Bill, S. 713, be returned to the Senate "in session".

An examination of the Journals of the House and Senate from the 51st to the 74th Congress, both inclusive (1889-1936), shows that from 1889 to 1933 there was not a single instance of any President attempting to return a bill to either House by the delivery of the bill to any officer of such House, but that the uniform practice was for the President's Secretary or representative to be admitted into the Chamber of the House or Senate and, upon being introduced by the Door Keeper, *to address the presiding officer in open session and announce the message from the President.* This examination also shows that during the period 1933-1936 the same practice prevailed except in the four following instances, involving four private relief bills all originating in the Senate, in which the President attempted to return the bills to the Senate by a delivery thereof to the

Secretary of the Senate, namely: *S. 1724*, 73 Cong., 2 sess. (Senate Journal 199), which was reintroduced in the 74 Cong., 2 sess., as S. 427 and passed and approved by the President (Senate Journal 309); *S. 694*, 74 Cong., 1 sess. (Senate Journal 490), which forms the basis of a pending suit in the Court of Claims; *S. 713*, 74 Cong., 2 sess. (Senate Journal 271), which forms the basis of this suit; and *S. 929*, 74 Cong., 2 sess. (Senate Journal 271).

II.

The Congress of the United States is both Houses thereof and cannot be one house thereof.

That the Congress of the United States is composed of both the Senate and the House of Representatives and cannot consist of one of them is so obvious and settled as not to be open to debate.

In the very first sentence of the Constitution (Sec. 1, Article I), it is provided that the Congress of the United States "shall consist of a Senate and House of Representatives".

The preliminary draft of Clause 2, Section 7, Article I, as reported by the Committee on Detail on August 6, 1787, did not contain the words "the Congress" but the words "the Legislature", used precisely in the same sense that those words were used in the New York Constitution of 1777, from which the provision of the Federal Constitution was mainly derived. The legislature of New York consisted of two Houses—the Senate and House of Assembly. In the final draft of the Federal provision, reported on September 12, 1787, by the Committee on Style, the words "the Congress" were substituted for the words "the Legislature". (See *U. S.* v. *Weil*, 29 Ct. Cl. 523, 538; *Charles Warren, "The Making of the Constitution,"* p. 384, 686.)

In the expression "the Congress by their adjournment" the modifying possessive adjective and verb are both in

the plural, indicating, on the part of the Committee on Style, careful diction, coordinate thought and a clear intent that "the Congress" should be understood in the plural sense as denoting the concurrent adjournment of the two Houses of the National Legislature just as the words "the Legislature by their adjournment" as used in the New York Constitution meant the adjournment of the whole law making power of that State.

This is further emphasized by the fact that while the "return" of the bill was to be to the particular House in which it originated the "adjournment" referred to in the same provision is not the adjournment of a particular House but the adjournment of "the Congress"—the whole Legislative power of the United States.

III.

Only when THE CONGRESS, by their adjournment, prevent a return does a Bill, not signed and objected to by the President, fail to become a law.

As pointed out hereinbefore, it is settled that the return of this Bill was, under the Constitution (Clause 2, Section 7, Article I), required to be made to the Senate "in session" and could not be made to the Secretary of the Senate for subsequent delivery by him to the Senate (*The Pocket Veto Case*, 279 U. S. 655).

Assuming that the President was prevented by the adjournment of the Senate from returning the Bill and his objections to the Senate "in session", the Bill became a law without the President's approval and signature, because there was no adjournment of "the Congress" which prevented the return and there is no provision in the Constitution that a Bill, disapproved by the President, shall not become a law when he is prevented from making a return to the body in which it originated by reason of a recess or adjournment of that body.

The language of Clause 2, Sec. 7, Article I is unambiguous. The President must be prevented from returning the Bill by an adjournment of "the Congress." The framers of the Constitution defined the term "the Congress" and provided that it should "consist of a Senate and House of Representatives." Furthermore, the framers anticipated not only adjournments of "the Congress" but also adjournments of either House thereof and, therefore, carefully provided (Clause 4, Sec. 5, Article I) that "neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days."

With knowledge, then, that one of the Houses of Congress could adjourn for three days during a session of Congress, the framers provided that only when "the Congress by their adjournment" prevented the return of a Bill should it fail to become a law. And nowhere did they provide that when one House of the Congress, by its adjournment, prevented the return of a Bill should it fail to become a law.

It is not likely that the framers of the Constitution intended to make the fate of an act of Congress depend upon any merely incidental or accidental act or omission of either House of Congress, of which the general public might or might not be aware, such as a sudden adjournment over for a day to attend a funeral or a failure of a quorum to attend on a particular day, or like incidental recess or adjournment. It is quite apparent the framers did not intend that an act of Congress which the President did not approve should expire by default unless its demise were attended by a *solemn, deliberate and concurrent adjournment of the entire Legislative Branch.*

The power to legislate is exclusively lodged in the Congress. The power of the President, with respect to legislation, is advisory only. The President does not possess the power to kill a single bill, but he does possess the power to deprive the Congress of the right to exercise legislative

power in respect to a particular bill unless a larger number are in favor thereof than is necessary in the ordinary exercise of legislative power. *While, therefore, not possessing the power to legislate, the President, nevertheless, possesses the power to restrict the exercise by Congress of the power to legislate.* The power of the President being, then, a restriction upon the exercise of the legislative power by Congress, the provisions of the Constitution with respect thereto should be construed to permit the exercise of the executive power only when and in the manner expressly granted and never in a case of doubt or uncertainty.

The only possible way in which it can be held that S. 713 failed to become a law is to write into the Constitution something which is not there and to do so notwithstanding that the framers knew and provided for three day adjournments of either House and yet did not provide that a Bill should not become a law when the President was prevented from returning it by the adjournment of the House in which it originated. To hold that S. 713 did not become a law means changing the words "unless the Congress by their adjournment prevent its return" (Clause 2, Sec. 7, Article I) to read "unless the Congress or the House in which it shall have originated by their adjournment prevent its return." This, we respectfully submit, cannot possibly be done without absolutely destroying every fundamental concept of constitutional interpretation.

In *Lake County* v. *Rollins*, 130 U. S. 662, involving construction of a provision of the Constitution of Colorado, counsel offered interpolations of the provision. This Court stated (p. 670):

> "We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its

> reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well settled rule which we must observe. The object of construction, applied to a Constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument."

In the case of *United States* v. *Sprague*, 282 U. S. 716, this Court stated (p. 731):

> "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition."

IV.

The established practice has been that a Bill not approved and signed by the President becomes a law notwithstanding that a recess or adjournment of the House in which it originated prevented its return.

In *The Pocket Veto Case*, 279 U. S. 655, this Court held (p. 689) that:

> "Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character."

and the Court discussed the construction placed upon the constitutional provision in reference to so-called "pocket vetoes".

Senate Bill 713 was not returned by the President to the Senate in the time and manner prescribed by the Constitution. *In contemplation of the Constitution that Bill has never been returned to the Senate. At the expiration*

of the constitutional 10 days the status of S. 713 became fixed by the Constitution and no subsequent action by either the President or Congress could change that status. The Bill either became a law by reason of the President's failure to constitutionally return it or it died in his hands as a so-called "pocket veto", on the theory that the recess or adjournment of the Senate alone prevented its return. Not only does the language of the Constitution forbid the latter conclusion, but legislative and executive interpretation throughout our entire history is opposed to it.

From the First Congress in 1789 to the end of the 74th Congress in 1936 there were a total of 601 so-called "pocket vetoes", 117 of which occurred during the first term of President F. D. Roosevelt (House Document No. 493, 70th Cong., 2nd Sess. discussed in "*Pocket Veto*" case *supra;* "Record of Veto Messages", 51st to 74th Cong., Government Printing Office, 1936; House and Senate Journals 1st to 74th Congresses).

As shown by the Journals of the Senate and House of Representatives, of these 601 so-called "pocket vetoes", 5 followed adjournments of Congress for the Christmas Holidays; 3 followed adjournments within the session during the administration of President Johnson; 247 followed *sine die* session adjournments; and 354 followed *sine die* adjournments of Congress.

In all instances, except where a Congress adjourned by reason of the expiration of its term, adjournments were pursuant to *resolutions concurred in by both Houses;* and in *no single instance* was there a "pocket veto" due to the recess or adjournment of one House alone within 10 days, Sundays excepted, of the presentation of the bill.

On the contrary, we cite the following instances where bills have been treated as laws without the President's approval when the House in which the bills originated was in recess or adjournment on the 10th day after presentation.

The Presidents and Congress regarded the status of these bills as fixed by the Constitution into laws, and they were published and enforced as laws, just as S. 713 became fixed into a law by the Constitution upon the failure of the President to make a constitutional return thereof with his objections.

(a) In the first session of the 54th Congress, three Senate bills, to wit: Nos. 1, 138 and 142, were presented to President Cleveland on January 28, 1896 (Senate Journal, 100). *On the 10th day thereafter,* namely, February 8, 1896, *the Senate was in recess* (Senate Journal 120). On February 10, 1896, President Cleveland's secretary, Mr. Pruden, addressed the presiding officer of the Senate and said, among other things, that these three bills "having been presented to the President of the United States January 28, 1896, and not having been returned by him to the House of Congress in which they originated within the ten days prescribed by the Constitution *have become laws without his approval*" (Senate Journal, 121).

(b) In the second session of the 54th Congress, Senate Bill 724 was presented to President Cleveland on January 5, 1897 (Senate Journal, 41). *On the 10th day thereafter,* namely, January 16, 1897, *the Senate was in recess* (Senate Journal, 54). On January 18, 1897, President Cleveland's secretary, Mr. Pruden, addressed the presiding officer of the Senate and said, among other things, that this bill "having been presented to the President on the 5th instant, and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution *has become a law without his approval*" (Senate Journal, 57).

(c) In the third session of the 66th Congress, Senate Joint Resolution 191 was presented to President Wilson on December 17, 1920 (Senate Journal, 26). *On the 10th*

day thereafter, namely on December 29, 1920, *the Senate was in recess* (Senate Journal, 34). On January 7, 1921, President Wilson delivered a message to the Senate, by Mr. Sharkey, his secretary, saying, among other things, that this Joint Resolution "having been presented to me on December 17, 1920, and not having been approved by me or returned to the Senate within the 10 days prescribed by the Constitution, *has become a law without my approval"* (Senate Journal, 46).

(d) At the second session of the 53rd Congress House Bill 2582 was presented to President Cleveland on August 6, 1894. *On the 10th day thereafter,* August 17, 1894, *the House was in recess* (House Journal, 574). On August 20, 1894 (House Journal, 575), a message from President Cleveland announced that this bill "having been presented to the President on the 6th instant, *had become a law without his approval".*

(e) At the same session of Congress House Bill 6518 was presented to President Cleveland on August 7, 1894. *On the 10th day thereafter,* August 18, 1894, *the House was in recess* (House Journal, 574). On August 20, 1894, a message from President Cleveland announced that this bill "having been presented to the President on the 7th instant (August 7, 1894) *had become a law without his approval".*

(f) At the first session of the 54th Congress House Bills 3607 and 4526 were presented to President Cleveland on May 19, 1896. *On the 10th day thereafter,* May 30, 1896, *the House was in recess* (House Journal, 556). On June 3, 1896, a message from President Cleveland announced that these Bills "were presented to the President May 19, 1896, and not having been returned by him to the House of Congress in which they originated within the ten days prescribed by the Constitution *have become laws without his approval"* (House Journal, 569).

(g) At the second session of the 54th Congress House Bill 7777 was presented to President Cleveland on January 12, 1897. *On the 10th day thereafter,* January 23, 1897, *the House was in recess* (House Journal 104). On January 28, 1897 (House Journal, 122), a message from President Cleveland announced that this Bill "having been presented to the President on January 12, 1897, and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution *has become a law without his approval*".

The legislative history of the 10 bills above cited is legally and constitutionally identical with the legislative history of Senate Bill 713, and it is apparent that if those bills became laws Senate Bill 713 also became a law. But we do not say that the 10 bills cited became laws because the Presidents thought they became laws or Congress treated them as laws any more than it can be said that Senate Bill 713 did not become a law because the President thought he had prevented it from becoming a law. Upon the failure of the Presidents to return all these bills in the constitutional period their status became fixed by the Constitution (*i.e.,* they were laws or not laws) and nothing the Presidents or Congress could do could change that status.

We cite the instances of the ten bills to show merely that Presidents Cleveland and Wilson and the Congresses to which the bills were returned believed that when a bill was not returned in the time prescribed by the Constitution it became a law although the House in which it originated was not in session on the 10th day, the Congress not having adjourned. And these executive and legislative precedents, coupled with the fact that not a single instance is found throughout our history of a so-called "pocket veto" due to the adjournment of one House of Congress alone, is such clear proof of long executive and legislative interpre-

tation as to be strongly persuasive of the meaning of the constitutional provision.

V.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition should be granted.

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